

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK STATE RESTAURANT
ASSOCIATION,

Plaintiff,

v.

Case No. 1:07-cv-05710 (RJH)

NEW YORK CITY BOARD OF HEALTH,
NEW YORK CITY DEPARTMENT OF HEALTH
AND MENTAL HYGIENE, and THOMAS R.
FRIEDEN, in his official capacity as Commissioner
of the New York City Department of Health
and Mental Hygiene,

Defendants.

**MOTION OF U.S. REPRESENTATIVE HENRY WAXMAN,
FORMER FDA COMMISSIONER DAVID KESSLER,
PUBLIC CITIZEN, CENTER FOR SCIENCE IN THE PUBLIC INTEREST,
AMERICAN COLLEGE OF PREVENTIVE MEDICINE,
AMERICAN DIABETES ASSOCIATION,
AMERICAN MEDICAL ASSOCIATION,
AMERICAN PUBLIC HEALTH ASSOCIATION,
CALIFORNIA CENTER FOR PUBLIC HEALTH ADVOCACY,
THE MEDICAL SOCIETY OF THE STATE OF NEW YORK,
TRUST FOR AMERICA'S HEALTH, AND
PROFESSORS OF MEDICINE, NUTRITION AND PUBLIC HEALTH
FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*
IN SUPPORT OF DEFENDANTS**

The individuals and organizations listed below hereby request leave to file the accompanying brief as *amici curiae* in support of defendants New York City Board of Health, New York City Department of Health and Mental Hygiene, and Health Commissioner Thomas R. Frieden.

The principal purpose of *amici's* brief is to assist the Court in understanding the statutory and regulatory framework created by the Nutrition Labeling and Education Act of 1990 (NLEA), Pub. L. No. 101-535, 104 Stat. 2535 (1990), and to explain why the Act does not preempt New York City's calorie labeling rule. Because the New York State Restaurant

Association's express and implied preemption arguments rest on a fundamental misunderstanding of the NLEA, *amici* include an explanation of the Act's basic structure and of Congress's conscious decision not to preempt state law requirements for nutritional labeling of restaurant food. In addition, *amici* briefly touch on the sweeping implications of the Restaurant Association's novel First Amendment theory. The identity and interest of the *amici curiae* are as follows:

U.S. Representative Henry Waxman was the chief sponsor of the NLEA in the U.S. House of Representatives and has long been a leader in Congress on nutrition and food policy issues. He has represented California's 30th District since 1974 and is currently the Chairman of the House Committee on Oversight and Government Reform, which has oversight authority over all federal agencies, including the U.S. Food and Drug Administration.

David A. Kessler was appointed Commissioner of the U.S. Food and Drug Administration by President George H.W. Bush in 1990. He was sworn in as Commissioner on the same day that President Bush signed the NLEA into law, was reappointed by President Clinton, and served through 1997, when he became Dean of the Yale School of Medicine. Dr. Kessler is currently Dean and Vice Chancellor for Medical Affairs at the University of California, San Francisco. Prior to his tenure at FDA, Dr. Kessler, who is also a lawyer, was a lecturer in food and drug law at Columbia Law School.

Public Citizen is a non-profit consumer advocacy organization with a longstanding interest in fighting exaggerated claims of federal preemption of state health and safety regulation and defending consumers' rights to know information that affects their health. Public Citizen's lawyers have represented parties and *amici* in the most significant federal preemption cases, *see e.g., Riegel v. Medtronic*, -- S.Ct. --, *cert. granted*, June 25, 2007; *Bates v. Dow*

Agrosciences, 544 U.S. 431, 449 (2005); *Medtronic v. Lohr*, 518 U.S. 470 (1996), and have also argued several seminal cases involving the commercial speech doctrine, *see e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Edenfield v. Fane*, 507 U.S. 761 (1993).

Center for Science in the Public Interest (CSPI) is a national, non-profit advocacy organization for nutrition and health, food safety, and sound science. CSPI's advocacy was instrumental in getting Congress to consider nutrition labeling legislation in 1989 and in securing passage of the NLEA in 1990, and CSPI has tirelessly advocated for effective FDA enforcement of the NLEA in the seventeen years since its enactment. In addition, CSPI led the advocacy efforts on behalf of New York City's restaurant calorie labeling rule last year, and is working with other cities and states across the nation on similar measures.

The **American Medical Association**, an Illinois non-profit corporation, is the largest professional association of physicians and medical students in the United States. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these still remain its core purposes. Its members practice in every state, including New York, and in every specialty.

In June 2007, the AMA, concerned by the alarming incidence of obesity and of obesity-related medical conditions, specifically resolved that calorie content, in addition to other nutrition information, be displayed on menus and menu boards in fast-food and other chain restaurants.¹

¹ The AMA and Medical Society of the State of New York join this brief both in their own persons and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts.

The **American College of Preventive Medicine**, established in 1954, is the national professional society for physicians committed to disease prevention and health promotion. To address the lack of nutrition labeling and the rising obesity rates in adults and children, ACPM introduced the menu-labeling resolution that was passed by the AMA's House of Delegates last month.

The **American Diabetes Association** is a nationwide non-profit organization founded in 1940 to advance the interests of the now nearly 21 million Americans with diabetes. ADA's mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes. It is the nation's leading voluntary health organization supporting diabetes research, information and advocacy. ADA believes that providing calorie information available through postings on menu boards is a critical step in helping people get the information they need to understand how foods they eat impact their weight and overall nutrition goals.

The **American Public Health Association** is the oldest, largest and most diverse organization of public health professionals in the world and has been working to improve public health since 1872. The Association aims to protect all Americans and their communities from preventable, serious health threats. APHA believes that requiring nutrition labeling at fast-food and other chain restaurants is particularly important given how many of our calories are consumed at restaurants, the large portion sizes and high calorie contents often served at restaurants, and the lack of nutrition information at restaurants.

California Center for Public Health Advocacy is a non-profit organization established in 1999 by California's two public health associations to raise awareness about critical public health issues and is currently the lead supporter of a bill before the California State Legislature to require nutrition labeling on menus and menu boards in chain restaurants.

The Medical Society of the State of New York, an organization of approximately 30,000 licensed physicians, medical residents, and medical students in New York State, is committed to representing the medical profession as a whole and advocating on its behalf concerning health-related rights, responsibilities, and issues.

Trust for America's Health is a non-profit, non-partisan organization dedicated to saving lives by protecting the health of every community and working to make disease prevention a national priority.

George L. Blackburn holds the S. Daniel Abraham Chair in Nutrition Medicine at Harvard Medical School, where his researches focuses on obesity and clinical nutrition. He is also the Chief of the Nutrition Laboratory and Director of the Center for the Study of Nutrition Medicine at the Beth Israel Deaconess Medical Center, Boston.

Richard J. Deckelbaum is the Robert R. Williams Professor of Nutrition, Chairman of the Institute of Human Nutrition, and Professor of Pediatrics and Epidemiology at Columbia University's Mailman School of Public Health and College of Physicians and Surgeons, where his research focuses on translating basic nutritional questions into lipid and cellular biology.

Penny M. Kris-Etherton is Distinguished Professor of Nutrition at Pennsylvania State University, where her research focuses on effects of diet on metabolism and platelet function.

Francine R. Kaufman is Director of the Comprehensive Childhood Diabetes Center at Children's Hospital Los Angeles and Professor of Pediatrics at the University of Southern California School of Medicine. She is an expert on childhood diabetes-obesity epidemic and the author of *Diabesity* (2005).

Alice H. Lichtenstein is the Stanley N. Gershoff Professor of Nutrition Science and Policy and Professor of Public Health and Family Medicine at Tufts University, as well as Senior Scientist and Director of the Cardiovascular Nutrition Laboratory at the Jean Mayer USDA Human Nutrition Research Center on Aging. Her research examines the effect of diet on disease risk factors.

Marion Nestle is the Paulette Goddard Professor of Nutrition, Food Studies, and Public Health at New York University, where her research focuses on the role of food marketing as a determinant of dietary choice. Her books include *Food Politics: How the Food Industry Influences Nutrition and Health* (2002, revised 2007); and *What to Eat* (2006).

Barry M. Popkin is the Carla Steel Chamblee Distinguished Professor of Global Nutrition at the University of North Carolina, Chapel Hill, where he directs the Interdisciplinary Center for Obesity and the Division of Nutrition Epidemiology and studies dynamic changes in diet, physical activity, and body composition, with a focus on rapid changes in obesity.

Walter Willett is the Fredrick John Stare Professor of Epidemiology and Nutrition at the Harvard School of Public Health, Professor of Medicine at Harvard Medical School, and the author of *Eat, Drink, and Be Healthy: The Harvard Medical School Guide to Healthy Eating*. He is also one of the principal investigators on the Nurses Health Study, one of the largest, long-term studies to look at the effect of diet on health.

* * *

This request is timely filed within seven days of defendants' brief pursuant to Fed. R. App. P. 29(e) and all parties have consented pursuant to Fed. R. App. 29(a). Mark Muschenheim, counsel for defendants, and Nancy Milburn, counsel for plaintiffs, have both indicated that they consent to this request.

CONCLUSION

The motion of U.S. Representative Henry Waxman, David A. Kessler, Public Citizen, Center for Science in the Public Interest, American College of Preventive Medicine, American Diabetes Association, American Medical Association, American Public Health Association, California Center for Public Health Advocacy, The Medical Society of the State of New York, Trust for America's Health, and Professors of Medicine, Nutrition, and Public Health for leave to file a brief as *amici curiae* should be granted.

Respectfully submitted,

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July 16, 2007

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[PROPOSED] ORDER

The motion of U.S. Representative Henry Waxman, David A. Kessler, Public Citizen, Center for Science in the Public Interest, American College of Preventive Medicine, American Diabetes Association, American Medical Association, American Public Health Association, California Center for Public Health Advocacy, The Medical Society of the State of New York, Trust for America's Health, and Professors of Medicine, Nutrition, and Public Health for leave to file a brief as *amici curiae* is HEREBY GRANTED.

SO ORDERED.

Dated: June ____, 2007

Richard J. Holwell,
United States District Judge